



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 279 OF 2011

PATRICK NYORO NJUGUNA..... CLAIMANT

VERSUS

THE EAST AFRICAN PORTLAND CEMENT CO. LTD..RESPONDENT

RULING

1. By judgment delivered on 28th March, 2014, Justice D. K. Njagi Marete ordered of relevance to this ruling as follows:-

a. THAT the respondent be and is hereby ordered to pay the balance of income tax deducted from the claimant in disregard of the tax exemption by the Minister in legal Notice No. 178 dated 5th November, 2010.

b. THAT the computation of income tax due and owing to the claimant shall take into account the items exempted under Legal Notice cited in order No. 1 above.

c. THAT the amount of Kshs.590,195/= admittedly remitted to the claimant shall be borne in mind in the computation of the final amount of tax due and payable to the claimant.

2. The respondent being aggrieved by the award, filed an application for the review of the award on 23rd July, 2014 contending that,

(a) The award was in breach of the law, that is section 13(2) of the Income Tax Act and Legal Notice number 178 of Kenya Gazette dated 5th November, 2010.

(b) Gratuity was normal pension benefit not pegged on the voluntary early retirement scheme hence not exempt from the provisions of Income Tax Act.

(c) The income tax deducted from the claimant's gratuity was duly remitted to the Kenya Revenue Authority hence should not have been ordered refunded by the respondent to the claimant

3. The claimant on the other hand by an application dated 10th September, 2014 seeks an order of this court that the respondent be directed to pay the applicant Kshs.1,203,915 being retained tax due to the applicant in terms of the award given on 28th March, 2014, together with interest

thereon at Court rates from the date of the award until payment in full.

4. The prayers sought in the claimant's application which was filed later in time than the respondent are in nature a request for assistance from the Court to enforce the award made on 28th March, 2014. It is for this reason that on 13th March, 2014, I ordered that submissions in response to the claimant's application bear in mind the respondent's application dated 23rd July, 2014.

5. As submitted by counsel for the respondent, section 16 of the Industrial Court Act, 2011, the Court has power to review its orders and judgments. Further rule 32(1) permits review on account of breach of any written law among other grounds.

6. According to counsel, the Legal Notice No. 178 of 2010 clearly provided for the lump sum retirement benefits paid to 27 employees of the respondent who opted for voluntary early retirement with effect from 31st March, 2010 be exempt from the provisions of Income Tax. This exemption, counsel submitted, did not extend to other pension benefits paid to employees.

7. According to Mr. Ouma, gratuity for the period served by the unionisable employees as per the Collective Bargaining Agreement was therefore subject to income tax since it was the claimant's entitlement regardless of the mode of termination of employment. That is to say it was not pegged on voluntary early retirement but was a normal pension benefit. On the other hand, the 3 month's salary in lieu of notice and the 4 months' severance pay for each year remaining to retirement was lump sum payment payable only on terms of voluntary early retirement.

8. The Legal Notice Number 178 of 5th November, 2010 provided as follows:-

IN EXERCISE of the powers conferred by section 13 (2) of the Income Tax Act, the Deputy Prime Minister and Minister for Finance directs that the lump sum retirement benefits paid to twenty-seven employee of the East African Portland Cement company who opted for voluntary early retirement with effect from 31st March, 2010 and 30th April, 2010, respectively, shall be exempt from the provisions of the Act:

Provided that-

(a) the exemption shall not apply to other pensions benefits paid to the employees;

(b) an employee who has opted for voluntary early retirement shall not be eligible for re-employment with the East African Portland Cement Company, in any capacity or under any terms whatsoever before the expiry of three years from the date of retrenchment; and

(c) the East African Portland Cement company shall, in addition to complying with any conditions that the Commissioner of Income Tax may impose, furnish the Commissioner in respect of every employee opting for retirement, with the name, date of retirement, the amount paid and a copy of the letter confirming the retirement.

9. This notice refer to two types of benefits that is; lump sum retirement benefit and other pension benefits paid to employees. These two level of payments are however not defined or explained anywhere in the documents before the Court.

10. In an undated letter attached as appendix 4 in the respondents bundle of documents attached to memorandum of response, the former Head of Public Service Amb. Francis K. Muthaura, informed the Permanent Secretary, Ministry of Industrialization, Prof. Lonyangpuo of the approval of the proposal to retire the respondent's employees and directed the said Permanent Secretary to inform the respondent accordingly. This communication was eventually made known

to the claimant vide a letter dated 12th April, 2010.

11. In relation to the claimant, his exit package was to be

(i) Three months' salary in lieu of notice.

(ii) Severance pay of four months basic salary for each year remaining to retirement

(iii) Payment of outstanding leave days up to and including date of exit

(iv) Gratuity as per the Collective Bargaining Agreement.

12. It is this payment as relates to the claimant and his colleagues who opted for early retirement that was subject of the Legal Notice No. 178 of 5th November, 2010.

13. Whereas the notice qualifies that the tax exemption did not apply to other pensions benefit paid to employees; it does not specify which these **"other pensions"** are. On the other hand, the inclusion of gratuity as per the Collective Bargaining Agreement in the retirement lump sum imports the interpretation that it was the intention of the Minister as communicated through the then Head of Public Service in the letter referred to earlier that it be exempted from taxation.

14. Whereas ordinarily gratuity would be paid as matter of course upon retirement or abrupt termination of employment, its inclusion in the lump sum retirement package payable to respondents workers concerned in this case hence the claimant, make this situation an exceptional circumstance. Other pension referred to in the notice may have been a precautionary statement but did not refer to gratuity as per Collective Bargaining Agreement.

15. The consequence of the foregoing is that the respondents application for review dated 23rd July, 2014 is hereby disallowed and the claimant's application dated 10th September, 2014 is hereby allowed with consequence that the respondent shall pay the claimant the sums retained as tax together with interest at Court rates as prayed.

16. If the respondent had remitted the tax retained to KRA, the same remain claimable as rebate for future taxes.

17. It is so ordered.

Dated at Nairobi this 20th day of February 2015

Abuodha J. N.

Judge

Delivered this 20th day of February 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge